

Decision of the Appeal Division

Number: 92-0658, 92-0659, 92-0660
Date: March 26, 1992
Panel: Thomas Kemsley, Walter N. Peain, Alex S. Brokenshire
Subject: Section 6(1) – “Disabled From Earning Full Wages”

This case involves appeals by both the employer and the worker and a referral by Mr. Kenneth Dye, president and chief executive officer of the Workers' Compensation Board, from the findings of the Workers' Compensation Review Board dated July 4, 1991.

The issues raised relate to the worker's entitlement to a disability award for the permanent effects of bladder carcinoma that he was diagnosed as having in May 1986. It has been determined that this cancer was an industrial disease caused by the worker's employment.

The worker was employed in an aluminum smelter for 28 years and retired in 1988 at the age of 62. In May 1986 he was first diagnosed as having bladder cancer. He had a two-gram tumor removed from his bladder and, the following year, had a testicle removed on a preventative basis. Since that time, the worker has had to undergo regular cystoscopies to check for any recurrence of the cancer. He has had no recurrence of the cancer since 1986 and, as a result, the frequency of his cystoscopies has been reduced from four per year to one per year. He will need to continue with the cystoscopies for the rest of his life. In 1988, the worker retired due to several factors, including his cancer problems.

On June 7, 1988 the disability awards officer sent a letter to the worker which denied a permanent disability pension on the basis that:

It is not felt that permanent partial disability exists. . . . Your bladder function is felt to be normal and is non-problematic based on the latest medical information on this file. . . . It is not felt that your present condition will, in the future, affect your earning capacity and, therefore, no permanent partial disability award is payable on your claim.

The Review Board allowed the worker's appeal from that decision by finding that the worker did have a permanent disability and was entitled to a functional award. The Review Board stated:

The disability is an invasion of his body which may not manifest itself every day, but in requiring him to be disabled for a period of time, at least two times a year presently, is not an industrial disease which the panel finds can be dismissed respecting pension entitlement by a conclusion that its effect is "deemed to be so minimal as to have no effect on a worker's earning capacity."

. . . The ongoing physical and psychological effects of a person having bladder cancer and having to face a lifetime of periodic cystoscopy checkups, together with the unknowing of whether his cancer will recur or not, constitutes a very real disability.

The Review Board panel then referred the claim back to the Board to adjudicate the quantum of the worker's physical or functional award. It noted that no loss-of-earnings award was applicable as the worker's early retirement was a decision of personal choice rather than one of necessity because of his bladder cancer.

Counsel on behalf of the employer appealed the Review Board decision and argued that the worker had no permanent disability as he had no physical impairment of his bladder function, there was insufficient evidence of any psychological impairment, there had been no significant tissue removal from his bladder, and his need for regular cystoscopies was not a functional impairment. Counsel said, however, that the worker's subjective complaints, in particular relating to the pain and discomfort from ongoing cystoscopies, should be considered by the Board for a permanent disability award. Counsel also argued that the Review Board decision in the worker's case was not consistent with Review Board decisions in similar cases.

Counsel on behalf of the worker also appealed the Review Board decision on the basis that the Review Board had rejected the application of the Quebec Annotated Scale of Bodily Injuries to this case. He requested the Appeal Division confirm the Review Board finding that the worker had a permanent disability and to settle the disability award by determining the percentages that should apply to the worker's objective, subjective and psychological disabilities plus the loss of one testicle. The worker's counsel further argued for the application of age adaptability to the award.

Mr. Dye made a referral, dated August 1, 1991, pursuant to Section 96(4) of the *Workers Compensation Act* (the *Act*) to the Appeal Division. The referral stated that the Review Board decision of July 4, 1991 "contravenes Section 6(1) of the *Workers Compen-*

sation Act and the published policy of the governors as set out in #25.30 of the *Rehabilitation Services and Claims Manual*” as, based on the finding of the Review Board that the worker’s decision to retire from work was due to personal choice rather than his compensable disability, it appeared that the worker did not meet the requirement of Section 6(1) of the Act that he be disabled from earning full wages by his industrial disease.

Section 96(4) Referral

The referral raises the preliminary issue of whether or not the worker satisfies the basic entitlement criteria of Section 6(1) of the Act. It was difficult to fully canvass this issue as both counsel agreed that the worker did meet the requirements of Section 6(1). As well, the Board had already accepted that conclusion as it had paid the worker temporary disability benefits in the past. The letter of the claims adjudicator dated April 23, 1987 set out Section 6(1) of the Act and said, “I am pleased to advise that your Application for Compensation has been accepted as a Board responsibility.” The referral was the first time that the Board had raised this argument against the worker but Mr. Dye’s letter did not fully explain the Board’s argument.

We are satisfied that the worker does meet the requirements of Section 6(1) of the Act. Mr. Dye questioned whether the worker met the test of being “disabled from earning full wages.” The word “disabled” is not defined in the Act and it is used, in different sections of the Act, to refer to both temporary and permanent disabilities. According to the worker’s evidence, prior to his retirement, he was off work at least seven times due to his compensable industrial disease and received temporary disability benefits for at least 14 days. As well, if he had continued to work, he would have lost occasional days from work for his ongoing cystoscopies. Therefore, the worker’s industrial disease did disable him from earning full wages as of 1986. He met the test of Section 6(1) in 1986 and received temporary disability benefits. There is nothing in the Act that says he has to meet that test again to be considered for permanent disability benefits. Section 6(1) says that once the criteria are met, compensation is payable “as if the disease were a personal injury arising out of and in the course of that employment.”

We do not understand the Board’s conclusion, in 1991, that the worker did not meet the requirements of Section 6(1). We do not know if the Board was saying that its original decision in 1986 to pay temporary disability benefits was wrong, or that the worker had to satisfy the requirements of Section 6(1) a second time in order to get a permanent disability award. We reject both of those arguments.

The worker’s counsel raised an additional point about this referral; that, since there is no Board policy in the *Rehabilitation Services and Claims Manual* (the *Manual*) concerning Section 6(1), no referral could be made under Section 96(4) that the Review Board finding was in “contravention of a published policy of the governors.” As we

have already answered the referral in the negative, it is not necessary to deal with this point. However, we note that item #25.30 of the *Manual* merely repeats the language of Section 6(1) and offers no interpretation of the words “is thereby disabled from earning full wages at the work at which he was employed” that is relevant to the facts of this case, and to other similar cases. Therefore, if we had to decide this point, we would have difficulty in finding that item #25.30 created “published policy of the governors” by merely reproducing Section 6(1) of the *Act*.

In conclusion, we find the referral dated August 1, 1991 raises no error of law or contravention of a published policy of the governors in the finding of the Review Board.

Appeal – Permanent Partial Disability Award

We find, as did the Review Board, that the worker has a permanent disability relating to his industrial disease. It has objective, psychological and subjective elements. The ongoing need for cystoscopies does create a permanent, although not constant, state of physical invasion of his body which, each time it occurs, would physically disable the worker. It is not minimal as, prior to retirement, he had already lost a number of days from work due to cystoscopies. Each cystoscopy required admission to the hospital, a general anesthetic, and an insertion of a cystoscope through the penis into the bladder, and possibly into the kidneys. The worker has suffered bleeding and pain from the cystoscopies for up to 48 hours afterward. We find this constitutes a permanent physical impairment that can be observed and measured on “objective” factors.

We find that this permanent disability also encompasses “subjective” factors. There is pain and discomfort, and apprehension and fear that relate to the ongoing cystoscopies and the risk of cancer recurrence in the bladder. The subjective factors could disable the worker for periods of time in excess of that due to the physical effects of the cystoscopies.

With respect to the psychological disability, on the evidence available this does not appear to be significant for the worker and cannot be distinguished from the subjective factors, but does reinforce them. The psychological factors cover the same fear and apprehension for the future as set out in the subjective complaints, which have to be recognized as having some impact on the worker’s ability to earn income.

The extent of these permanent disabilities is not major for this worker. He lost only a few days from work due to each cystoscopy and claims not to be unduly bothered by the psychological and subjective factors. He does acknowledge the pain and discomfort and the fact that he does worry about the cancer recurring. As evidence of this, he said if he did not worry about a recurrence of the cancer he would not have

had a testicle removed on a preventative basis. Clearly that was not an easy decision to make, as he had conflicting medical opinions, but his decision to have that operation was a good indication of how his cancer in 1986 has affected his mental state since.

This worker is a very positive and mentally strong individual who has a good outlook on life. Otherwise, the subjective and psychological impact of his disability would likely be much greater.

We agree with the Review Board that the assessment of the worker's permanent partial disability award should be done, in the first instance, by the Disability Awards Department.

We do not agree with the worker's counsel that the Quebec Schedule should be applied here. The Schedule used by the Board is a complex matter of policy that involves medical opinions as well as decisions about assessment rates. The Board has not adopted the Quebec Schedule and we can find no error in that. We do have concerns about the current Schedule under our *Act*, which appears to be somewhat outdated and incomplete, but we do not consider that gives us the authority to adopt a Schedule from another jurisdiction in this case. The disability here has to be assessed with reference to Schedules used in other jurisdictions, as required by item #39.50 of the *Manual*, and in accordance with other policies in the *Manual* with respect to the assessment of permanent disabilities.

Our view of this available material is that the worker's disability due to objective factors is in the low to middle of a zero to five percent range, while his disability due to a combination of subjective and psychological factors is probably on the high end of the same range. With respect to the loss of a testicle, while this would not physically interfere with the performance of a job, it seems similar to the potential psychological effect of impotence on job performance and earning capacity. The removal of one testicle would not likely have the same disabling effect as impotence on average, but it would appear that the psychological disability relating to the loss of a testicle could be assessed as high as fifty percent of the assessment for impotence. The worker gave evidence that he does feel differently about himself since that operation.

While the loss of the testicle was for preventative reasons, we do not consider that to be a relevant factor here. The worker acted on the advice of a specialist who considered that there was an increased risk of cancer in the testicle due to the bladder cancer. This was a reasonable step for the worker to take to guard against the spread or recurrence of his compensable cancer in another part of his body, and we consider the loss of the testicle to be part of his compensable claim.

With respect to a loss-of-earnings award, the worker could have continued in his former work, albeit with occasional time off due to the effects of his permanent disability. He most likely would have done that had he not been offered a financially attractive early retirement package. While his bladder cancer was a relevant factor, we cannot find that it required him to retire early. Therefore, we cannot see how the worker has incurred any ongoing loss of earnings due to his permanent disability under this claim. The occasional time that he would have lost had he not retired will be compensated for by the functional award.

We refer this file to the Disability Awards Department to do the assessment of the worker's permanent disability award based on objective, subjective and psychological factors, including his psychological disability relating to the loss of his testicle. It will be important for the disability awards officer to follow item #39.50 of the *Manual* and have regard to "the circumstances of the claimant, medical opinions of Board or non-Board doctors, and to Schedules of Disability used in other jurisdictions." Quebec is a relevant jurisdiction in that regard, as it is the other Canadian jurisdiction which has aluminum smelters that have caused bladder cancer in workers.

Age Adaptability

The above award will not be a Scheduled award. Nevertheless, item #39.50 of the *Manual* states that a disability awards officer will have regard to the age of the claimant. We are not certain that the worker's age is a very relevant factor here as he was close to retirement and not seeking other employment. The disability awards officer will need to consider the effect of the worker's age in determining the disability award here.

Conclusion

We answer Mr. Dye's referral in the negative. We deny the appeal of the employer. We deny the appeal of the worker. We refer the matter to the Disability Awards Department to assess the worker's permanent partial disability award.

Editors' note: This decision has been edited for publication.